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“Love is blind, and lovers cannot see”:¹ Resisting Copyright’s Romance

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I Introduction

As an area of academic study copyright has always been vaguely romantic. Perhaps attracted by the two dominant justificatory discourses of copyright law, it has tended to be populated by scholars with a particular interest in the creative or cultural aspects of the subject matter with which it is concerned. Amongst those prone to be receptive to this type of thing, who would not have been seduced by the attractions of the incentive-based justification, with its promises of ever more cultural production and innovation? And, as for the natural rights theory, the life-affirming qualities of the idea of recognising the special status of acts of cultural production and those who engage in them is more or less evident. Critical engagement with copyright law has, however, exposed its uncertain and compromised relationship with a range of concepts that inform this justificatory discourse. The copyright treatment meted out to ideas around things such as authorship, creativity and cultural production – not to mention their specific instantiations in literature, drama, dance, art, music and film – have been exposed in a probing, excellent and often interdisciplinary literature that inevitably dowses overly romantic sensibilities.² This body of literature addresses, in varying ways and degrees, the mismatch between concepts and conditions of creativity and cultural production, on the one hand, and their mutant second life according to copyright law, on the other. It also critically reflects on the consequences of copyright’s legal identity as a property right and the way in which the occidental framing of the property concept impacts on creativity and cultural production globally. However, it was perhaps the emergence of a literature on the political economy of copyright³ that did most to expose its ugly underbelly and the way in which the romantic discourse of copyright has been corrupted by its engagement with the capitalist system. The ensuing debate between copyright

¹ William Shakespeare, *The Merchant of Venice*, Act 2, Scene VI.

² There is a large literature here, of which an indicative list might include the following: R J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham: Duke University Press, 1998); C J Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011); J Gaines, *Contested Culture: The Image, the Voice and the Law* (Chapel Hill/London: University of North Carolina Press, 1991); E Hemmungs Wirtén, *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization* (Toronto: University of Toronto Press, 2004); D McClean & K Schubert (eds), *Dear Images: Art, Copyright and Culture* (London: ICA, 2002); P Parrinder & W Chernaik (eds), *Textual Monopolies: Literary Copyright and the Public Domain* (London: University of London Press, 1997); M Rose, *Authors and Owners: The Invention of Copyright* (Boston: Harvard University Press, 1993); D Saunders, *Authorship and Copyright* (London: Routledge, 1992); B Sherman & A Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* (Oxford: Clarendon, 1994); M Woodmansee & P Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994).

³ In particular, R V Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview, 1996).

maximalists and copyright minimalists (and even abolitionists)⁴ has been played out on a legal turf that is substantially imbricated with the values of this system.

At the same time and running parallel to these debates, copyright as a legal construct has been appropriated into substantial engagements with other legal constructs and regimes. This engagement, precisely because it calls - in often contradictory ways – on particular aspects of the copyright legal regime, provides fertile empirical ground on which to reflect on the debates over the meaning of copyright's life and work. And perhaps also allows us to predict the possible futures of copyright. With a view to obtaining these sorts of insights, and without having any confidence at this point in the likely success of the enterprise, this essay considers the relationship of the copyright regime with the regimes of international trade, cultural rights and cultural heritage. The aim is to consider how these various sub-systems of law, all having a substantial life at the level of international law, interact with the copyright sub-system, which embodies one of the oldest property rights systems recognised in international law.⁵ In order to frame this analysis, the article first considers the location of these various regimes within the international legal order, and then proceeds to comment on copyright's various regime entanglements.

II International law as systemically divided

The current international legal order, which has emerged since the end of the Second World War, embraces a kind of schism between public international law and international economic law. The United Nations organizations, which form the framework for public international law, arose from the Dumbarton Oaks negotiations. The institutions of international economic law emerged from the Bretton Woods negotiations, which drew up the charters of the International Monetary Fund (IMF), the International Fund for Reconstruction and Development (which became the World Bank), and the International Trade Organization. Despite being the progeny of Franklin D Roosevelt's "one-worldism", the International Trade Organization never came into existence.⁶ However, it metamorphosed into the 1947 version of the General Agreement on Trade and Tariffs (GATT) and was, accordingly, a precursor to the World Trade Organization (WTO). From the beginning, the mandates of these two systems of international law were distinct. The Bretton Woods institutions were to manage international economic relations, while the Dumbarton Oaks institutions were to manage the international political order. As part of this mandate, the Dumbarton Oaks institutions have taken charge of what have been described as "state-making and war-making" functions.⁷ In addition to this, the system of public international law that has been built up around the Dumbarton Oaks institutions has purported to establish international standards in a variety of areas such as the protection of human rights, the environment and cultural heritage.

This bifurcation of international law along the lines of the putative division between the political and the economic appears to be rooted in the origins of the Westphalia System. The principle that quarrels between sovereigns did not implicate non-combatant civilians was built into the Peace of Westphalia of 1648.⁸ As a consequence, the treaties that built upon the Settlement of Westphalia abolished trade

⁴ Eg J Smiers, *Arts under Pressure: Protecting Cultural Diversity in the Age of Globalization* (New York: Zed Books, 2003).

⁵ As enshrined in the Berne Convention for the Protection of Literary and Artistic Works 1886.

⁶ See further G Arrighi, *The Long Twentieth Century: Money, Power and the Origins of Our Times* (London/New York: Verso, 1994), 276-277; G Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round & Globalism – A Critique* (London/New York: Zed Books, 2001), 26-28.

⁷ Arrighi, n 6 *supra*, 275.

⁸ Arrighi, n 6 *supra*, 43.

barriers and sought to protect the rights of private enterprise to trade across state borders, even during times of war or other political turmoil. Arrighi remarks that “[t]his reorganization of political space in the interest of capital accumulation marks the birth not just of the modern inter-state system, but also of capitalism as world system”.⁹ It is true that the economic freedoms of Westphalia were not observed during the period of political turmoil and violence marked by the Napoleonic Wars. They were, however, restored in the Settlement of Vienna of 1815 and the Congress of Aix-la-Chapelle of 1818.¹⁰ Similarly, after the First and Second World Wars “the United States first became hegemonic by leading the inter-state system towards the restoration of the principles, norms and rules of the Westphalia System, and then went on to govern and remake the system it had restored”.¹¹

From their inception, little was provided in the way in legal linkage between the Bretton Woods and Dumbarton Oaks institutions. Nominally, the Bretton Woods institutions were established within the UN system,¹² but the IMF and World Bank have in practice always been independent from it. Interestingly, however, the proposed Charter of the International Trade Organization did allow a member aggrieved by an International Trade Organization decision to seek an advisory opinion from the International Court of Justice, the decision of which would be binding on the International Trade Organization. This attempt at a legal interface between the ordering of the international economic and political systems did not, however, survive the demise of the International Trade Organization.¹³

Despite the legal separation of the two regimes, their institutions and activities have a clear, if changing, interrelationship. The issue of international environmental regulation is a good example of the formal legal divide and substantive overlap that pervades the relationship between international economic law and public international law.¹⁴ This is not just because of the potential for conflict between the WTO multilateral trade agreements and the obligations imposed on states under the various multilateral environmental agreements.¹⁵ It is also because the issue of international environmental regulation cuts across the areas of economic and political management of international relations.¹⁶ Similar claims might be made with respect to the protection of human rights, including cultural rights. At the international level, human rights concerns have traditionally been seen as a preserve of the Dumbarton Oaks system. However, it is increasingly evident that they are raised not only in the context of the international management of the political order, but also in relation to the international management of the economic order.¹⁷

At its broadest, the attempt of the international system to divide the indivisible, with its implicit denial that the economic is part and parcel of the political, has proved a very effective weapon in suppressing

⁹ Arrighi, n 6 *supra*, 44. See also, eg, A O Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (New Jersey, Princeton University Press, 1977, reprinted 1997); S Amin, *Capitalism in the Age of Globalization* (London & New York, Zed Books, 1998); J Gray, *False Dawn: The Delusions of Global Capitalism* (New York, New Press, 1998).

¹⁰ Arrighi, n 6 *supra*, 52.

¹¹ N 6 *supra*, 65.

¹² See Dunkley, n 6 *supra*, 26-27.

¹³ For an elaboration of this argument, see F Macmillan, “International Economic Law and Public International Law: Strangers in the Night” [2004] 6 *International Trade Law and Regulation* 115-124.

¹⁴ See F Macmillan, *WTO and the Environment* (London: Sweet & Maxwell, 2001), esp ch 9.

¹⁵ See Macmillan 2001, n 14 *supra*, ch 2.

¹⁶ See Macmillan 2001, n 14 *supra*, 267-268.

¹⁷ See, eg, the following papers issued by the OHCHR: *The Impact of the TRIPs Agreement on the Enjoyment of All Human Rights: Report of the High Commissioner for Human Rights* (E/CN.4/Sub.2/2001/13); *Globalization and its Impact on the Full Enjoyment of Human Rights: Report of the High Commissioner for Human Rights* (E/CN.4/2002/54); *Liberalization of Trade in Services and Human Rights: Report of the High Commissioner for Human Rights* (E/CN.4/Sub.2/2002/9); *Human Rights, Trade and Investment: Report of the High Commissioner for Human Rights* (E/CN.4/Sub.2/2003/9).

and resisting political contestation. This might be, in part, because especially in the neo-liberal period the location, or relocation, of legal questions in the realm of the economic tends to depoliticize them on the basis that they are somehow part of an unquestionable “scientific” economic order.¹⁸ However, I suggest that the depoliticization authorized by law is more profound and subtle than that authorized by economics. This is because one result of the divided international legal system is that the space of contestation between the two systems, the space where parts of each system come into real conflict with each other, is never seen by the eye of the law. The strange history of intellectual property law generally, and copyright specifically, in this bifurcated system of international law provides a good example of this effect, pursuant to which dissonance is ignored and political contestation is suppressed. While intellectual property law now seems firmly ensconced on the international economic law side of the equation, it had - and to some extent continues to have - a life that falls on both sides of the systemic divide.

III International trade regime

More than twenty years after the birth of the WTO and its (in)famous Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), it's easy to forget that, prior to the explicit opening of the fissure in international law caused by the birth of the WTO, international law in the area of intellectual property was the exclusive preserve of the World Intellectual Property Organization, a United Nations instrumentality. The relocation of intellectual property law within the WTO system may have amounted to a small scale tsunami in international law terms but it was also, of course, an acknowledgement of the ever-increasing significance of intellectual property rights in international trade and investment. This was not something reflected in the relevant international legal instruments prior to the WTO. The foundational Berne Convention for the Protection of Literary and Artistic Works (1886) makes copyright sound like something enjoyed only by authors of creative works; and although the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) protects corporations investing in the creation or distribution of copyright works, the habit of referring to them as enjoying “related rights” created some rhetorical distance from the heartland of copyright. Nevertheless, the evidence of the widespread ownership, trade and investment in copyright interests by the multinational media and entertainment corporations was there for anyone who wanted to see it.

Building on the broad and substantial base provided by the exclusive property rights conferred on them by their copyright portfolios, taking advantage of the horizontal integration of their business interests across a wide range of diverse cultural outputs, and organising themselves internationally through a corporate group structure, a small number of multinational corporate interests came to dominate the global market for the creation and distribution of certain forms of cultural production.¹⁹ As I have argued extensively elsewhere, this dominance, which is particularly marked in (but not limited to) the music and film industries, has produced a range of undesirable cultural and political effects.²⁰ These effects include things like the global homogenisation of cultural output, the creation

¹⁸ See also A Perry Kessaris, “Prepare Your Indicators: Economic Imperialism on the Shores of Law and Development” (2011) 7 *Law in Context* 401-421.

¹⁹ See esp Bettig, n 3 *supra*.

²⁰ Eg F. Macmillan, “The Cruel ©: Copyright and Film” [2002] *European Intellectual Property Review* 483-492; F Macmillan, “How the Movie Moguls Learned to Stop Worrying and Love the New Technology” in L Moran, I Christie, E Loizidou & E Sandon (eds), *Law's Moving Image: Law and Film* (London: Glasshouse, 2004); F Macmillan, “Commodification and Cultural Ownership” in J Griffiths & U Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford: OUP, 2005); F Macmillan, “Public Interest and the Public Domain in an Era of Corporate Dominance” in

of a monological corporate culture, the repression of acts of resistance against such a culture, the silencing of alternative discourses, and the general constriction of creativity and innovation. My argument has never been that this is some type of global conspiracy (although it might be), but rather that these are simply the effects of a system of property rights that privileges the investment in certain forms of creativity over other non-market values inherent in those creative forms. Certain aspects of copyright law have been particularly significant in this context. The fact that copyright conveys rivalrous private property rights is clearly of central importance, but the methods by which these rights can be obtained and their scope are also critical to understanding copyright's relationship to investment and capital accumulation. For instance, not only do the corporate commodifiers in the media and entertainment industries obtain copyright interests by assignment from the authors who, according to copyright law, are the first owners of copyright, but they are also granted ownership rights in some forms of cultural products from the outset as if they were authors. And then, the scope of the copyright interest is broad, while the various exceptions and defences to its exercise seem to be subject to a continuing contraction.

Many people who clung to, or were convinced by, the romantic conception of copyright law only seemed to notice this state of affairs after the immense power of these corporations was put to the task of reshaping international law to reflect their interests.²¹ Almost as if the announcement of the relocation of the "trade-related" aspects of intellectual property law, including *even* copyright, into the newly created WTO regime, revealed an aspect of the life of intellectual property that had previously been concealed. This is not to say, however, that this relocation did not have significant effects. Since the arrival of the TRIPs Agreement, intellectual property law has been explicitly configured as being about "rights" in relation to "trade". For those who would want to see copyright bolstering the fundamental role of cultural products as a having a value in their own right, rather than a purely instrumental role, some comfort might be taken from the fact that the reference to "trade-related aspects" suggests that there may be some other aspects - but it is cold comfort. Not only is the TRIPs Agreement the dominant normative instrument of international intellectual property law, its location within the suite of WTO agreements means that it is an integral part of a powerful system of international economic law-making.²² These two aspects of the TRIPs Agreement are, of course, intrinsically related. The systemic power and concomitant strong enforcement procedures of the WTO are a large part of the reason that the TRIPs Agreement has acquired the ability to define the parameters of intellectual property law discourse. Consequently, the TRIPs Agreement has provided an authoritative consolidation and normalisation of the pre-existing real life of intellectual property law generally and copyright law specifically. And that real life is not only as a self-declared "trade-related" right, but even more as an investment right.²³

The copyright provisions of the TRIPs Agreement are, more or less, the same as those that were already laid down in the Berne Convention.²⁴ This means that there are not enormous differences

B Andersen (ed), *Intellectual Property Rights: Innovation, Governance and the Institutional Environment* (Cheltenham: Edward Elgar, 2006).

²¹ S K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: CUP, 2003), esp chs 5 & 6

²² See further D Kennedy, "The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law" (1995) 10 *American University Journal of International Law and Policy* 671-716; & Macmillan 2004, n 13 *supra*.

²³ F Macmillan, "Looking Back to Look Forward: Is there a Future for Human Rights in the WTO?" [2005] 6 *International Trade Law and Regulation* 163-180; F Macmillan, "The World Trade Organization and the Turbulent Legacy of International Economic Law-making in the Long Twentieth Century" in J Faundez & C Tan (eds), *International Law, Economic Globalization and Developing Countries* (Cheltenham: Edward Elgar, 2010).

²⁴ TRIPs Agreement, Art 9.1, incorporates Berne Convention, Arts 1-21, except Article 6*bis* (moral rights) by reference. TRIPs Agreement, Arts 10-14 add some further obligations. In particular, Arts 11 and 14.4 broaden the exclusive rights

between the legal framework of international copyright law before and after TRIPs. Yet, as is well-known, context is everything. The reification of intellectual property rights as trade rights, capable of enforcement through a system of trade retaliation, emphasises certain aspects of the international copyright landscape at the expense of others. This perception is reinforced by two further factors. The first is that the TRIPs Agreement has shown itself to be a useful uniform basis upon which to negotiate bilateral investment treaties, which may strengthen the oligopolistic nature of the market for cultural goods and services.²⁵ This gives further weight to my suggestion above that the TRIPs Agreement might be even better characterised as an investment agreement than as a trade agreement.²⁶ The second factor reinforcing the nature of the change in the international copyright landscape was that the interpretation and enforcement of international copyright law was vouchsafed to trade law experts.

I do not wish to linger too long on the effects which the TRIPs Agreement has had on the international trajectory of copyright law. However, the early example of the WTO panel in *US – Section 110(5) of US Copyright Act*²⁷ is perhaps worth mentioning as an illustration of the new life of copyright law in the hands of those who know little about its old life. This case considered the so-called three step test for the validity of national copyright exceptions in Article 13 of the TRIPs Agreement.²⁸ This is clearly of central importance in the present context since the exceptions, the scope of which has progressively diminished, are the key to establishing some sort of balance between the exercise of the rivalrous private property right of the copyright owner and important objectives, such as the promotion and diffusion of cultural creativity and innovation. This dispute offered the opportunity for the WTO panel to reflect on the legitimate policy purposes of national exceptions to the rights of the copyright holder, which might be thought to include, for example, include the need to balance the interests of copyright owners and users in certain cases. Needless to say, this opportunity was not seized by the panel. Not only did the panel ignore Article 7 of the TRIPs Agreement itself, which speaks about intellectual property rights being used in a manner which is “conducive to social and economic welfare, and to a balance of rights and obligations”, it also overlooked the whole concept of copyright as a balance between rights and obligations.²⁹ The loss of any discourse about balance in copyright law obviously enlarges copyright’s potential as a tool of cultural domination and homogenisation.

Despite this unashamedly negative account of the relocation of international copyright law into the regime of international economic law, it must be conceded that it has had an important and positive political effect. This is because it was a key moment in raising awareness about the real nature of intellectual property rights, including copyright. It may be true, as I suggest above, that the divided nature of the international legal regime tends to suppress political contestation, but at least in the case of intellectual property law, its passage from one side of the regime to the other has provoked a period

of the copyright holder by the addition of rental rights in relation to computer programmes, films and phonograms. However, neither of these provisions are unique in international copyright law: see WIPO Copyright Treaty 1996, Art 7; and WIPO Performances and Phonograms Treaty 1996, Arts 9 & 13.

²⁵ See P Drahos, “BITS and BIPs: Bilateralism in Intellectual Property” (2001) 4 *Journal of World Intellectual Property* 791-808.

²⁶ See n 23 *supra* & accompanying text.

²⁷ *US – Section 110(5) of US Copyright Act*, WT/DS/160/R, 15/6/2000 (hereafter *US Copyright*).

²⁸ TRIPs Agreement, Article 13 provides:

Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

²⁹ For a longer exposition of this decision, see F Macmillan, “Development, Cultural Self-Determination and the World Trade Organization” in A Perry-Kessaris (ed), *Law in Pursuit of Development: Principles into Practice* (London: Routledge/Cavendish, 2010).

of prolonged debate that, so far as copyright is concerned, often goes under the description of the “copyright wars”. While the sparking of this debate also owes something to the punitive effects of the TRIPs Agreement regime (and the WTO) on the so-called developing world, it has generated a serious inquisition into the general nature and effects of intellectual property rights. The copyright wars, not unlike other multi-party conflicts, offer a rich array of strategic positions. I hope, however, it is not too simplistic to say that these positions might be captured under four, not necessarily discrete, banners. These are: copyright as a fundamental property right; copyright as a fundamental cultural right; copyright as a means to encourage innovation; and, copyright as a self-defeating restriction on creativity, innovation, free speech and participation in cultural life. What this means is that skirmishes in the copyright wars have tended to take the copyright debate back into the territory of public international law, or at least to pull it to and fro between its manifestations on both sides of the divide between public international law and international economic law. This is well-illustrated by the recently reinvigorated debate around copyright and cultural rights.

IV Cultural Rights

At this point, in the unlikely case that they are not already evident, I should nail at least some of my own colours to the mast. In my view one of the most pernicious, intellectually unjustified and dangerous discourses in intellectual property scholarship and commentary is that which claims that the Article 15(1)(c) of the UN Charter on Economic Social and Cultural Rights, requiring the protection of authors’ moral and material rights, gives a human rights justification for the grant of intellectual property protection.³⁰ This is particularly so when it is accompanied by a discourse that claims a human right to property. Nevertheless, this characterization of intellectual property continues to be widespread, especially with respect to copyright and especially at the levels of international law and policymaking. This is so even though a moment’s serious consideration of Article 15(1)(c), and of Article 27 of the Universal Declaration of Human Rights from which it is drawn, makes it clear that there is nothing in these provisions that mandates, or even authorises, the protection of the cultural rights to which they relate through the proprietary apparatus of copyright. This claim has, however, been important in attempting to give copyright a life, and an unassailable one at that, on the public international law side of the divided international law system.

The suggestion that copyright is a fundamental human right, in the form of a cultural right, has also recently been rejected in the *Report of the Special Rapporteur in the field of cultural rights on Copyright Policy and the Right to Science and Culture*³¹ Not only should copyright not be conceived of as a cultural right, according to the *Report*, but it also should be understood as interfering with the realization of cultural rights. Emanating as it does from such an impeccable source within the public international law constellation, the *Report* is worth pausing over. It commences in a straightforward fashion, noting that despite the fact that they cover the same subject matter (science and culture) “two influential paradigms of international law – intellectual property and human rights – have evolved largely separately”.³² As private rights over intellectual property become ever stronger, the *Report* notes, the tension between these two regimes has increased. According to the *Report*, some of the consequences and/or risks of this separate evolution are: the privatization of human knowledge; the restriction of artistic and creative freedom; the squeezing of the public domain with the consequent

³⁰ To be clear, that is intellectual property protection in the form of an alienable private property right.

³¹ Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, *Copyright policy and the right to science and culture*, UNGA Doc. A/HRC/28/57, 24 December 2014, paras 26-29.

³² N 31 *supra*, para 2.

reduction in the capacity of everyone to take part in cultural life; restrictions on the general right to freedom of expression, including the right to receive information; and a failure to recognise the “unique concerns of indigenous peoples”.³³ The *Report* observes that “human knowledge” is “a global public good and ... States should guard against promoting the privatization of knowledge to an extent that deprives individuals of opportunities to take part in cultural life”.³⁴ With respect to artistic freedom, the *Report* notes that the width of the exclusive rights afforded to copyright holders enables them “to monetize a wide variety of uses and to prevent adaptations they find objectionable. Consequently, the creative freedom of other artists to build upon and adapt existing cultural works may become dependent upon their ability to pay a licensing fee”.³⁵ Similarly, on the question of the contracting of the public domain or cultural commons, the *Report* draws attention to the way in which the long duration of the copyright interest may interfere with the protection of “a vibrant public domain of shared cultural heritage, from which all creators are free to draw”.³⁶

However, the *Report’s* punchiest sections are directed at issues arising from the presence and activities of the media and entertainment corporations in the copyright context. The *Report* goes behind the figure of the copyright owner, drawing the critical distinction between the owner of the copyright interest, often a corporation, and the author of the copyright work. It is important to understand that the interests of these two figures may be not only different but “opposing”,³⁷ says the *Report*, and that the contractual relations between them regarding commercialization and distribution of works “are often marked by an imbalance of power between the parties”.³⁸ Applying its critical human rights eye, it notes that the economic interests of corporate rights holders “do not enjoy the status of human rights”.³⁹ Accordingly, “[f]rom the human rights perspective, copyright policy and industry practices must be judged by how well they serve the interests of human authors, as well as the public’s interest in cultural participation”.⁴⁰ The *Report* criticises, in particular, the overwhelming influence of the corporate sector in the political economy of international copyright law making, which it describes as a “democratic deficit in international policymaking on copyright” (para 19).⁴¹

As should be evident from the foregoing sections of this article, none of this is particularly new. But its source is interesting. Of course, there are many respects in which the *Report* could have gone further.⁴² And there are contradictory moments when it ascribes values to copyright law, drawn from the fundamental rights discourse, that seem misplaced. The *Report* might have noted, making a logical development of its own arguments, that the creation of private property rights over cultural products is part of a system designed to make those products liquid and that the purpose of making culture – or any other asset - liquid is to facilitate investment. In other words, the design of the system favours the accumulation of capital by those best able to harvest profits off that accumulation. In the same context, the *Report* might have also considered the significance of the fact that the media and entertainment corporations, which so successfully harvest profits off capital accumulation, are insiders in the copyright system. This is because, as already noted above, they become copyright owners, not only because they have taken some form of assignment or licence from a human being

³³ N 31 *supra*, para 56.

³⁴ N 31 *supra*, para 14.

³⁵ N 31 *supra*, para 22.

³⁶ N 31 *supra*, para 50.

³⁷ N 31 *supra*, para 38.

³⁸ N 31 *supra*, para 43.

³⁹ N 31 *supra*, para 41.

⁴⁰ N 31 *supra*, para 41.

⁴¹ N 31 *supra*, para 19.

⁴² See F Macmillan, “Copyright and Cultural Rights” in H Porsdam & L Belder (eds), *Negotiating Cultural Rights: Issues at Stake, Challenges and Recommendations* (Farnham: Ashgate, 2017a)

in circumstances of uneven bargaining power (or not), but because they have been granted copyright by operation of law from the outset *as if they were authors*. In other words, corporate systems of capital accumulation in relation to the creation and distribution of certain cultural forms are central to the copyright system. When the copyright system is seen in this light, one might reasonably query the nature of what the *Report* describes as “the social and human values *inherent* in copyright law”,⁴³ or “the social function and human dimension of intellectual property”.⁴⁴

Of course, in referring to copyright this way, the *Report* is having its own romantic moment about copyright and the values that underlie it. Perhaps it is also trying to revive a now somewhat neglected discourse that seeks produce a type of transubstantiation between the continental system of authors’ rights and copyright. Romanticism about the former is not necessarily misplaced. It is, of course, true that the system of authors’ rights derives its fundamental justification from the notion that an author’s personality is embedded in the work,⁴⁵ but this theory has very little purchase in the now internationally dominant Anglo-American concept of copyright.⁴⁶ That concept has traditionally justified the allocation of monopoly rights to creators and distributors of creative works on the basis that they will incentivise such creation and distribution. This has, nevertheless (contrary to the type of romanticism at issue here), involved it in the prioritisation of the accumulation of investment capital over “social values” or “social functions”. It is not so much here that I want to criticise the idea that copyright could or should have these values and functions,⁴⁷ but rather to focus on the arguably tenuous relationship with reality that such claims have when considered in the light of copyright’s history and political economy.

V Cultural Heritage

For me one of the particular examples of this misreading of copyright is exposed in the persistent attempts to link copyright with the protection of cultural heritage.⁴⁸ This question is addressed by the *Report* in relation to the cultural heritage of Indigenous Peoples, a context which will be overwhelmingly familiar to all copyright scholars. The *Report* cites the United Nations Declaration on the Rights of Indigenous Peoples (DRIPs),⁴⁹ Article 31(1), which seeks to assure Indigenous Peoples “the right to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions”. For reasons that are surely located in the historic and continuing injustice meted out to Indigenous Peoples – including the forced dispossession and misappropriation of their lands and culture, and their political

⁴³ N 31 *supra*, para 60, my emphasis.

⁴⁴ N 31 *supra*, para 90.

⁴⁵ See, eg, J Hughes, “The Philosophy of Intellectual Property” (1988) 77 *Georgetown Law Journal* 287-366; J Waldron, “From Authors to Copiers: Individual Rights & Social Values in Intellectual Property” (1993) 69 *Chicago-Kent Law Review* 841-887.

⁴⁶ Cf. J Ginsburg, “A Tale of Two Copyrights: Literary Property in Revolutionary France and America” (1990) 64 *Tulane Law Review* 1991-1031.

⁴⁷ On this point see further, eg, A Drassinower, *what’s wrong with copying?* (Cambridge, Mass/London: Harvard University Press, 2015); & N W Netanel, “Copyright and a Democratic Civil Society” (1996) 106 *Yale Law Journal* 283-387.

⁴⁸ See further F Macmillan, “Human Rights, Cultural Property and Intellectual Property: Three Concepts in Search of a Relationship” in C Graber & M Nenova (eds), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham: Edward Elgar, 2008); F Macmillan, “Cultural Property and Community Rights to Cultural Heritage” in T Xu & J Allain (eds), *Property and Human Rights in a Global Context* (Oxford: Hart, 2015); See F Macmillan, “The Problematic Relationship between Traditional Knowledge and the Commons” in S Pinton & L Zagato, *Cultural Heritage: Scenarios 2016* (Venice: University Ca Foscari Press, 2017b).

⁴⁹ GA Res. 61/295 (UN Doc. A/61/L.67 and Add.1), adopted on 13 September 2007.

marginalisation and disempowerment - the *Report* endorses the approach of Article 31(1). And it urges the observance of the values and principles embodied in the 1995 United Nations Guidelines for the Protection of the Heritage of Indigenous Peoples,⁵⁰ especially that “indigenous peoples’ ownership and custody of their heritage must continue to be collective, permanent and inalienable; that the free and informed consent of the traditional owners be a precondition of any agreements for the recording, study, use or display of indigenous peoples’ heritage: and that concerned peoples be the primary beneficiaries of commercial application of their heritage”.⁵¹

While in no way questioning the validity of the concern about the treatment of Indigenous Peoples that provides the context of this endorsement of both the 1995 Guidelines for the Protection of the Heritage of Indigenous Peoples and the 2007 DRIPs, one might wonder if the endorsement of Article 31(1) of DRIPs is consistent with the general position of the *Report* rejecting the proposition that Article 15(1)(c) of the Charter on Economic Social and Cultural Rights (and/or Article 27(2) of the Universal Declaration of Human Rights) mandates protection in the form of private property rights. Similarly, doubts might be raised about whether Article 31(1) is consistent with the idea of the protection of cultural heritage as a community right. And, on this basis, even whether it is consistent with the 1995 United Nations Guidelines for the Protection of the Heritage of Indigenous Peoples, cited in the *Report*. It is not only that a form of private property protection is an inherently problematic way to protect what is said to be a community or collective right.⁵² It is also that protecting the cultural heritage of Indigenous Peoples through a private property device developed according to an understanding of creativity propounded by the ideals of the European enlightenment has the capacity and potential to change the shape of that heritage in ways that are not necessarily the consequence of the reflexive cultural practice that constitutes it. Overall, it seems to me to be questionable that intellectual property rights can ever – or could ever be expected to - do the things that the 1995 UN Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples envisaged.⁵³

My scepticism on this front is, of course, shared neither by those who view copyright with rose-tinted glasses, having been fatally contaminated with the idea that it forms part of the discourse of cultural rights, nor by those who have some other political, strategic or institutional reason for continuing to assert copyright’s vibrant life as part of the public international side of international law. In particular, position-taking by certain institutions of international law has been very significant in driving the direction of this debate. As is well-known, for example, one of the strategies adopted by WIPO (a UN agency) in order to carve out a sphere of influence post-TRIPs is to continue to work on the question of the protection of Indigenous cultural heritage. While the current state of this work acknowledges important differences between the protection of cultural heritage and the protection of intellectual property, the location this work in WIPO gives pause for thought. One consequence of this location is that the concept of the heritage of Indigenous Peoples is organized around what might be described as an intellectual property “mentality”, which broadly reflects an equivalence between patents and traditional knowledge, on the one hand, and copyright and traditional cultural expressions, on the other. Another international institutional example of equal, but more generalized concern, is the insistence of UNESCO, which has responsibility for promulgating international law on the protection of cultural heritage, in mixing up cultural heritage and copyright. This confusion seems to have become particularly acute in the debate around the protection of intangible cultural heritage and

⁵⁰ E/CN.4/Sub.2/1995/26.

⁵¹ N 31 *supra*, para 58.

⁵² I do not discount here the possibility that that certain cultural property might be privately owned by individuals comprising part of an Indigenous community, but this is not the situation to which I make reference here.

⁵³ See Macmillan 2017b, n 48 *supra*.

cultural diversity, which are the subject of protection in two (of its three) twenty first century conventions, the 2003 Convention on the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention on the Protection and Promotion of Cultural Diversity. In part, this owes something to the ongoing question of the protection of the heritage of Indigenous Peoples and others to whom “folklore” might be thought to belong.⁵⁴ However, it is also part of a more broad-based UNESCO discourse that seems to equate the protection of heritage with copyright – or, at least, does not seem to regard them as being in fundamental tension with each other.⁵⁵ This, I think, is an error.

This tendency to elide intellectual property rights and cultural heritage rights appears to owe at least something to the confusion provoked by their competing invocations of intangibility. Intellectual property rights, unlike cultural heritage rights, are never claims to tangible objects but rather claims to intangible rights (albeit claims that often implicate tangible objects). Cultural heritage, on the other hand has awkward relationship to the distinction between the tangible and the intangible. While it applies to both, it is possible to exaggerate the significance of the distinction. This is partly because what makes a tangible thing into cultural heritage is its intangible or symbolic association.⁵⁶ While, at the same time, intangible cultural heritage generally has a tangible dimension.⁵⁷ Even though the copyright and cultural heritage ideas of intangibility are different, the disorientation of the intangible realm seems to augment the dangers of confusing, eliding and overlapping cultural heritage and intellectual property. So far as copyright and intangible cultural heritage is concerned, the tendency is particular acute because of obvious overlaps in the subject matter of their protection.

Both concepts are strongly associated with the creative arts. In the case of copyright one of the markers of the social acceptance of a practice as part of the creative arts in occidental society seems also to be the fact that that practice then came to be protected as a copyright work.⁵⁸ On the part of cultural heritage, this long-term association⁵⁹ is now clearly reflected in Article 2.2 of the Convention on Intangible Cultural Heritage. This provision, which makes the overlap between the two concepts more or less obvious, provides specific instances of the sort of stuff that falls within the Convention’s general definition of intangible cultural heritage⁶⁰ listed inclusively as follows:

- (a) oral traditions and expressions, including language as the vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.

⁵⁴ Smith notes, eg, in relation to UNESCO’s intangible heritage agenda, that “[c]oncerns for ‘folklore’ have been expressed in terms of copyright concerns since the 1950s” (citations omitted): L Smith, *Uses of Heritage* (London & New York: Routledge, 2006), 106.

⁵⁵ See, eg, the UNESCO “World Book and Copyright Day”, which takes places on 23 April and celebrates the day in 1616 on which Cervantes, Shakespeare and Inca Garcilaso de la Vega all died, having previously been impressively creative without the benefit of copyright: <http://www.unesco.org/new/en/wbcd> (accessed 31 March 2017).

⁵⁶ J Blake, “On Defining Cultural Heritage” (2000) 49 *International & Comparative Law Quarterly* 61-85.

⁵⁷ See R Harrison, *Heritage: Critical Approaches* (London & New York: Routledge, 2013), 14; & see also the definition of intangible cultural heritage in the Convention for the Safeguarding of the Intangible Cultural Heritage 2003, Art 2.1.

⁵⁸ L Bently & B Sherman, *Intellectual Property Law* (Oxford: OUP, 2009, 3rd ed), ch 2.

⁵⁹ E Hobsbawm, *Fractured Times: Culture and Society in the Twentieth Century* (London: Little, Brown, 2013), ch 12.

⁶⁰ See Convention for the Safeguarding of the Intangible Cultural Heritage 2003, Art 2.1.

However, it is not only the case that this list explains the tendency to confuse the two concepts, it also suggests the potential for conflict between them.⁶¹ It is clear that part of what might be considered to be intangible cultural heritage falls outside the copyright net because, even if its “authors” are identifiable, any copyright interest will have disappeared into the mist of the copyright duration rules. However, in the context of at least some things that fall within the idea of more contemporary cultural heritage, the conflict between their identity as intangible cultural heritage and their character as a copyright work is alive and well. However, the central tension, and fundamental difference between the two concepts - that while cultural heritage is something that “belongs” to a community,⁶² intellectual property including copyright is a rivalrous form of private property – means that these two systems involve two very different ways of expressing value.

In the neo-liberal period there is a tendency for everything to be subjected to what has been described as “total market thinking”.⁶³ Seeing the world through the spectacles of the neo-liberal framework leads to the conclusion that value can only be expressed through the market, which means that it can only be expressed in the form of a commodity. When we talk about the commodification of artistic works then the relevant instrument of commodification is almost always copyright because it is copyright that turns the relevant creative forms into private property. It is, therefore, critically important to distinguish between the fundamentally different concepts of not only copyright and cultural heritage, but also of the market and the community. This is because these are the two contexts in which copyright and cultural heritage, respectively, express and control the meaning of value. So while copyright as a private property right locates all relationships in the context of the market, the context of cultural heritage relationships is the community, of which the market forms a part but does not (or should not) control the whole.

In the world of total market thinking formal systems of private property rights such as copyright enjoy particular prestige. The more valuable the right in the marketplace the greater the prestige. In terms of the relationship between intellectual property and cultural heritage, it seems clear that cultural property/heritage has suffered from the ensuing prestige deficit, with a consequent impact on the way it is protected under international law.⁶⁴ However, if we want to have cultural practices that resist this reduction of everything to its value in the market, then we also need to find a device that resists the commodification, or creeping propertization, of everything and proposes an alternative basis for expressing and controlling value. At the moment, the best bet we have for this form of resistance is a more fully articulated concept of cultural heritage, which expresses and controls value according to the norms and identity of a community and not according to the market value of private property rights. But what would this more fully articulated legal concept of cultural heritage be? My suggestion is that it would be one that protected cultural heritage from the exercise of private property

⁶¹ Reference might also be made in this respect to the concept of protected “cultural diversity” in the Convention on the Protection and Promotion of Cultural Diversity 2005, Art 4.1.

⁶² This is also evident from the Convention of the Safeguarding of the Intangible Cultural Heritage, Art 2.1. On the questions of the identity of “communities” and the meaning of belonging see Macmillan 2015, n 48 *supra*; F Macmillan, “Cultural Heritage and the Unseen Community” in S Whatley, C Waelde, A Brown & S Harmon (eds), *Dance, Disability and the Law: Invisible Difference* (Intellect Books, 2017c); F Macmillan, “Contemporary Intangible Cultural Heritage: Between Community and Market” in C Waelde, C Cummings & M Pavis (eds), *Intangible Cultural Heritage and Contemporary Culture: a law and heritage exploration* (Cheltenham: Edward Elgar, 2017d).

⁶³ E Christodoulidis, “The European Court of Justice and ‘total market thinking’” (2013) 14 *German Law Journal* 2005-2020.

⁶⁴ See further J R Slaughter, “Form & Informality: An Unliterary Look at World Literature” in R. Warhol (ed), *The Work of Genre: Selected Essays from the English Institute*, (New York: English Institute in Collaboration with the American Council of Learned Societies, 2011)

rights, including private property rights in the form of copyright. This is, however, the very thing that the concept of cultural heritage contained in the UNESCO Conventions does not do.

One of the particularly strange results of the saturating effect of the intellectual property system is our acceptance, as Slaughter argues, of a state affairs in which we in the global north have intellectual property and the rest of the world has cultural property.⁶⁵ While Slaughter argues that the rest of the world suffers from the burdensomeness and lack of prestige arising from this state of affairs, it is worth also noting what a culturally impoverishing idea this is for the global north. And, assuming that we in the global north do have some cultural heritage/property, should it not be a concern of all of us that our heritage is not “collective, permanent and inalienable”, and that we are not afforded the opportunity to consent to the “recording, study, use or display” of our heritage?⁶⁶ Are we really supposed to be happy with the idea that when elements of our own heritage are privatised by large media and entertainment corporations we have to pay to enjoy, use or re-use it, with the result that that a large corporation is the “primar[y] beneficiar[y] of the commercial application” of our heritage?⁶⁷ Do we think this is alright because we in the global north are all one big (although not happy) community. One explanation of the elision of cultural heritage rights and intellectual property in the context of the rights of Indigenous Peoples under Article 31(1) of DRIPs is that the beneficiaries of both sets of rights are the same community. But this surely cannot apply with respect to cultural heritage at a more general level. The implicit idea that the law would regard me as being in community with Disney, so that when Disney privatises collective cultural heritage for its private profit there’s no problem, seems to me to be a bit of a problem.

VI Conclusion: Where to now?

A consideration of the relationship between copyright and cultural rights tends to suggest that copyright law, wherever it started in the bifurcated international law system, has well and truly passed over to the international economic law side of the equation. It is clear, however, that it has significant impacts across the systemic divide. And this, in legal terms, in one of the places where the central problem with which this article is concerned raises its head. Since there are no legal mechanisms to connect the two sides of the divided system, since there is no court that sits at the apex of the system balancing rights arising on both sides of the divided system, the problem is that the eye of the law does not even see the problem. However, the systemic blindness does not stop here. It is almost as if, having determined (erroneously as it turns out) that copyright represents a way of protecting cultural rights and cultural heritage, the architects of the system have simply refused to see it for what it is. It seems to me to be almost perverse that the one serious legal protection that could be offered to practices of intangible cultural heritage, protection from privatization, is one of the few things that neither of the two UNESCO Conventions says anything about. As a result, the law itself makes no attempt to understand the relationship between the way in which meaning is made in relation to the same cultural practices in the two different systems of intangible cultural heritage protection and intellectual property protection. Consequently, unconstrained by any legally imposed attempt at balance or restraint, the transcendence of total market thinking in the neo-liberal period has prioritised private property rights and their market exploitation over the demands of cultural heritage communities.⁶⁸ Current practices of cultural production - instead of expressing the identity, solidarity

⁶⁵ Slaughter, n 64 *supra*.

⁶⁶ To quote the *Report*, n 31 *supra*, para 58, on the rights of Indigenous Peoples: see text acc n 51 *supra*.

⁶⁷ *Report*, n 31 *supra*, para 58.

⁶⁸ See further Macmillan 2015, n 48 *supra*.

and mutual obligations of community⁶⁹ - are stymied and constrained by the deadweight of private property rights, often exercised not even by other members of the cultural heritage community but by the media and entertainment corporations who have commodified so much contemporary cultural output.

In the face of the law's incapacity to resolve problems in its divided system, and the related refusal on the part of those responsible for making law on either side of that system to see the true nature of the copyright system, we are left with a pressing political project. It is of critical importance that attention continues to be drawn to the (unromantic) political economy of copyright. While it may be discouraging that it took so long, some hope can be derived from the fact that aspects of this critical political economy analysis found their way into the *Report of the special rapporteur in the field of cultural rights*. The fact that they got there at all in such a resistant international policy-making context makes the *Report* a welcome novelty in the international law discourse around copyright. The *Report* should, therefore be seen as opening up a political opportunity for further contestation. As much as it might be out of fashion in the neo-liberal period, being romantic about the liberatory possibilities of politics seems to me to be more sustainable than the long and dangerous romance that has been the basis of too much copyright scholarship and policy-making in the post-Berne Convention period.

⁶⁹ Macmillan 2017c & 2017d, n 62 *supra*.